The California Legal Update

Remember 9/11/2001; Support Our Troops

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THIS EDITION'S WORDS OF WISDOM:

"*I'm not saying let's go kill all the stupid people. I'm just saying let's remove all the warning labels and let the problem work itself out.*" (Anonymous)

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ADMINISTRATIVE NOTES:

***Pardon Our Dust*:** Many of you have noticed, and some of you have commented on, our changing website and/or some temporary downtimes. That's all because my publisher, *Legal Updates Publishing Company*, at no cost to you or me, has been working diligently to update the server it uses and the ultimate quality of the website itself. This is still a work in progress, however. So in the meantime, we ask that you forgive us for the problems these changes are causing. In the end, all these growing pains will pay back dividends in the quantity and quality of the information that will be available to you, and

the speed by which it will all be coming to your computer. Check it out at www.legalupdate.com.

***Depublished Case*:** *People v. Wolfgang* (2015) 240 Cal.App.4th 1268, dealing with Fourth Waiver searches and described on pages 902 and 905 of the 16th Edition of the Fourth Amendment Search and Seizure manual recently sent out, has been depublished and is no longer available for citation. You might want to cross it off your copy of the manual.

CASES:

***Fourth Waiver Cellphone Searches*:**
***Good Faith Cellphone Searches*:**

United States v. Lara **(9th Cir. Mar. 3, 2016) 815 F.3rd 605**

Rule: (1) Probationary Fourth waiver searches do not include the right for law enforcement to search the probationer's cellphone unless cellphones are specifically listed in the waiver. (2) The officers' good faith reliance upon prior case law is not applicable in this context.

Facts: Defendant was on state probation from a conviction for the sale and transportation of methamphetamine (H&S §§ 11378, 11389(a)). As a condition of his probation, he had agreed to "submit my person and property, including any residence, premises, container or vehicle under my control to search and seizure at any time of the day or night by any law enforcement officer, . . . with or without a warrant, probable cause, or reasonable suspicion;" i.e., a "*Fourth Wavier*."

In October, 2013, defendant missed a required meeting with Probation Officer Jennifer Fix. As a result, Probation Officers Fix and Joseph Ortiz went to defendant's residence to contact him and to conduct a warrantless Fourth waiver search. In conducting such a search, it is standard protocol for probation officers to search the cellphones of probationers subject to search terms, especially if the probationer had been convicted of a drug trafficking offense. At defendant's house, Probation Officer Ortiz found a cellphone on a table. After confirming that it belonged to defendant, Officer Ortiz, without asking for permission, scrolled through the most recent texts messages and found three photographs of a semiautomatic handgun lying on a bed. The photos had been sent to someone named "Al," who responded, asking if the gun was "*clean*." Defendant had replied, "*yup*." Al texted back, asking; "*What is the lowest you will take for it*?" and "*How much*?"

Although the gun could not be found at defendant's home, GPS data embedded in the photographs and later found by lab personnel led officers to defendant's mother's house. When contacted, she directed the officers to a bedroom with bedding matching that shown in the photographs. Probation Officer Fix found a loaded handgun resembling the gun depicted in the photographs in a closet. Defendant was charged in federal court with being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). His motion to suppress the handgun was denied. Defendant appealed.

Held: The Ninth Circuit Court of Appeal reversed. On appeal, the Government argued that as a Fourth waiver search, no warrant or consent was required to search defendant's cellphone, but that even if unlawful, the "good faith" exception to the warrant requirement applies. The Court rejected both arguments.

(1) *Fourth Waiver Searches of Cellphones*: First, the Court held that a warrantless search is lawful only upon a finding that it was "*reasonable*" under the circumstances. A so-called "*Fourth wavier*" is but one factor to consider in determining the reasonableness of a search, "but is not in itself dispositive." "(P)robationers do not entirely waive their Fourth Amendment rights by agreeing, as a condition of their probation, to 'submit [their] person and property to search at any time upon request by a law enforcement officer.'" In determining whether or not a probation search is reasonable, a court must balance the defendant's privacy interest with the government's corresponding interest in conducting warrantless searches. Here, the Court held that as a probationer subject to search and seizure conditions, defendant's privacy interests were only "diminished," but not totally eliminated.

As a probationer who was on probation for a non-violent drug offense, and whose sole transgression here was missing a mandatory meeting with his probation officer, his privacy interests were stronger than those of a probationer who was believed to have committed some "serious and intimate offense." More importantly, defendant's search conditions, without cellphones being specifically mentioned, were not clear. Defendant agreed to waive the warrant requirements for searching "containers" and "property," along with his residence, premises, or vehicles under his control. Recent authority has made it clear that cellphones are not "containers." (See ***Riley v. California*** (2014) 134 S.Ct. 2473; *United States v. Camou* (9th Cir. 2014) 773 F.3rd 932.) Also, where, under the terms of the Fourth waiver, "property" can only be read to include those types of property specifically listed (i.e.; "property, including any residence, premises, container or vehicle under my control."), it is not reasonable to assume that cellphones, which were not mentioned, were intended to be included.

The Supreme Court has recognized (in *Riley*) that cellphones are much more than mere phones and carry a much higher expectation of privacy than in other things subject to being searched. They are actually "minicomputers" that contain cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers. Further, getting into one's cellphone gives the intruder access to vast amounts of personal data, such as medical and banking records, that is held by third parties. As such, the expectation of privacy one has in his cellphone is higher than in other items he might have under his control. While the governmental interest in monitoring probationers is certainly important, the Court found the probationer's privacy interests in his cellphone to outweigh the government's interests, particularly when the probationer's prior offense was for a non-violent drug offense and his current transgression was merely missing a meeting with his probation officer. Absent cellphones being specifically listed amongst the items subject to a warrantless search, defendant's cellphone was held *not* to be subject to a warrantless search under the terms of his Fourth waiver as written.

(2) *Good Faith*: The Government also argued that even if searching defendant's cellphone was a Fourth Amendment violation, the officers' "*good faith*" reliance on prior precedent (*Riley* having been decided after the search in issue) allowed for such a search. However, the Ninth

Circuit has held that for "good faith" to save an otherwise unlawful search, the officers must have relied upon prior "*binding appellate precedent*." Prior authority on this issue, however, is merely "unclear" or "conflicting," with good faith having been used only to allow an officer to escape liability under a "qualified immunity" argument in civil cases. Therefore, "good faith" does not save such a search when being tested in the criminal context. The warrantless search of defendant's cellphone, therefore, was unlawful, and the products of such a search should have been suppressed.

Note: Since *Riley* was decided (June 25, 2014), I've been telling anyone who asks that a Fourth waiver is (or should be) an exception to the warrant requirement as was discussed in *Riley*. *I was wrong*, at least if this decision is allowed to stand unchallenged. And as of now, I don't know whether the U.S. Attorney intends to ask for a rehearing, which would be the next step. But I've also been cautioning you that the courts are getting a bit picky on the wording we use in our Fourth waivers, holding us to the exact terms of the listed conditions. In San Diego, for instance, we've always used a standard, catch-all boilerplate waiver format which, as I recall, does not specifically mention cellphones. That needs to be changed if we're to try to do warrantless Fourth waiver cellphone searches like the one the probation officers did in this case. With cellphones being accorded a heightened level of privacy by both state and federal courts, it wouldn't be a bad idea to specifically and separately include cellphones in the objects that that are subject to being searched under a probationary Fourth waiver (or a parole waiver, for that matter, requiring, no doubt, an amendment to P.C. § 3067).

***Miranda*; *Invocation of Right to Remain Silent*:**
***Interrogations*; *Coercion*:**

People v. Villasenor **(Nov. 12, 2015) 242 Cal.App.4th 42**

Rule: (1) Any expression by an in-custody suspect to the effect that he wants to "cut off questioning" may be a *Miranda* invocation of his right to silence. (2) Ignoring an in-custody suspect's attempts to invoke his right to silence does not, by itself, render an interrogation coercive.

Facts: During the early morning hours of January 24, 2010, defendant, a 17-year-old Sureño street gang member, while a passenger in a car occupied by his older brother and three females, happened upon a drunk Armando Lopez who was sleeping it off in his car in a dark North Sacramento residential neighborhood. Lopez belonged to the rival Norteño criminal street gang, whose gang color is red. Unable to resist the temptation, defendant walked up to Lopez's car and reached in, lifting his shirt. Noting that Lopez was wearing a red belt, defendant determined that Lopez was a Norteño. So he did what any self-respecting Sureño would do, taking out his obligatory pistol and shooting Lopez twice. Lopez was wounded in the neck and the shoulder, the second bullet shattering a clavicle and fracturing a rib. However, he lived to testify at trial despite one bullet remaining lodged near his vertebral column.

Although Lopez couldn't identify the person who shot him, one of the female occupants of defendant's car later testified to him being the shooter. Two and a half months later, on the morning of April 3, defendant was again cruising around with other Sureño gang members in

North Sacramento when they passed Juan Alvarado, another Norteño gangster, walking down the street. Upon seeing Alvarado and recognizing him as someone his brother had had problems with at school, and after "staring him down" for a few seconds, defendant shot at him three or four times from his car, hitting him in the abdomen. One bullet passed through Alvarado's liver and gallbladder, and lodged in one of his kidneys. But he also survived. Alvarado positively picked defendant out of a photographic lineup even though he refused to identify him later at trial. Another of the vehicle's occupants also identified defendant as the shooter.

This second attempted murder led to defendant being taken into custody by investigating officers and read his *Miranda* rights. Transported to the police station, defendant was interrogated by Detective John Samples in a recorded interview. At some point early on during the five-hour interview, defendant asked when he could go home. The detective told him that "*We gotta finish, uh, havin our conversation*." Defendant soon repeated his request: "*Well, can we just stop and I can go home*? *Cause I ain't arrested*." Putting defendant off again, Detective Samples answered: "*We—we gotta go through this whole thing*." In the next fourteen minutes of the succeeding four hours of the interview, defendant either asked, or demanded, a total of thirteen times to be taken home or to call his parents to pick him up. Each request or demand was either ignored or denied, with the detective telling him that he was not finished being interviewed.

During most of this time, defendant continually denied any involvement in either shooting. Finally, however, after having asked to be taken home numerous times, and while never admitting to being the shooter, defendant finally began to weaken and admitted to being at the scene during both shootings. Tried as an adult and charged with two counts of attempted murder and all the appropriate firearm-use and gang enhancements, defendant's admissions were used against him at trial. The trial court had ruled that merely asking to be taken home was not a clear and unequivocal invocation to his right to silence, and therefore legally ineffective. Defendant was convicted of all counts and sentenced to prison for some 74 years and eight months to life. He appealed.

Held: The Third District Court of Appeal affirmed.
(1) *Invocation of Right to Silence*: Despite upholding defendant's conviction, however, the Court found that thirteen requests to be taken home within a fourteen-minute time period was in fact an unequivocal invocation of his right to silence. Continuing the interrogation after that (or, more specifically, after the third request), therefore, was a violation of *Miranda*. Once an in-custody suspect has waived his rights, any subsequent attempt on his part to invoke his right to counsel or to remain silent must be clear and unequivocal in order to be legally effective. Such an attempted invocation must be such that a reasonable officer in the interrogator's shoes, viewed objectively, would have understood the suspect to be invoking his rights. If it is not clear and unequivocal, then the interrogator may ignore him and continue on with the questioning, which is what Detective Sample did in this case.
An officer in such a position is not even obligated to seek clarification. The rule is the same for juveniles as it is for adults: "(O)nce a juvenile suspect has made a valid waiver of the *Miranda* rights, any subsequent assertion of the right to counsel or right to silence during questioning must be articulated sufficiently clear that a reasonable police officer in the circumstances would understand the statement to be an invocation of such rights." So the issue here was whether, by demanding to be taken home, defendant clearly and unequivocally invoked his right to silence.

A suspect who merely expresses frustration with his interrogator's relentless questioning, or tries to tell the detective that "that's my story and I'm sticking to it," does not effectively invoke his rights. But the defendant here was doing more than this. The Court held, contrary to the trial court's ruling on this issue, that defendant had in fact invoked his right to silence. Invoking one's *Miranda* right to silence is the equivalent of the right to "*cut off questioning*." Per the Court, under the circumstances here, where defendant continually demanded to be taken home, he clearly and unequivocally attempted to cut off the questioning. A reasonable officer in Detective Sample's position would (or should) have recognized that defendant's demands to be taken home constituted an invocation of his right to "cut off (the) questioning." In fact, after defendant's third demand to being taken home ("*Okay. Just take me home*."), the interrogation should have ceased. The error, however, in admitting into evidence defendant's post-invocation statements, was held to be harmless beyond a reasonable doubt in that the evidence against him was "overwhelming." Also, he only admitted to being at the scene of both shootings, never admitting to being the shooter. So the conviction stands.

(2) *Coercion*: Defendant also argued that his statements were the product of a coercive interrogation, and therefore involuntary. The Court rejected this argument, noting that merely ignoring an attempted invocation does not necessarily render an interrogation "*coercive*." In other words, defendant's attempts to invoke his rights does not necessarily mean that his "*will was overborne*," which is the test for coerciveness in an interrogation. Considering the totality of the circumstances, defendant's admissions in this case were the "product of a rational intellect and a free will." "The courts have prohibited only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable." Repeatedly ignoring defendant's attempts to invoke did not, under the circumstances of this case, meet this standard.

Note: The moral to this story is that to effectively invoke one's *Miranda* rights to an attorney or to remain silent, a suspect does is not necessarily required to utter any particular magic words (e.g., "*attorney*" or "*silence*"). His clear and unequivocal invocation may be deduced from any attempt to "*cut off questioning*," no matter how expressed. It's going to depend upon an analysis of the circumstances of each individual case, making the decision whether to continue an interrogation that much more difficult. No one can criticize Detective Sample, for instance, for not recognizing defendant's attempts to invoke. Prior case law has consistently required a more specific invocation to be legally valid.

The legal conclusion that a suspect may very well be invoking his rights by asking to be taken home is indeed an extension of the general requirement that an invocation be clear and unequivocal. In fact, the Court here had to resort to case law from other jurisdictions to justify its ruling. Note, however, that the Court believed that Detective Sample did in fact understand that defendant was trying to invoke, as expressed by the detective's comment at one point that; "*(y)ou want this to be finished*." The lack of a question mark ("?") indicates this to be a statement of fact as opposed to seeking clarification.

***Blood Draws from an Unconscious DUI Suspect*:**
***Implied Consent, per V.C. § 23612(a)(5)*:**
***Good Faith Reliance Upon a Statute*:**

People v. Arredondo **(Feb. 26, 2016) 245 Cal.App.4th 186**

Rule: (1) The implied consent provided for under V.C. § 23612(a)(5), to the effect that an unconscious person arrested for DUI consents to the warrantless withdrawal of a blood sample, is preempted by the Fourth Amendment requirement that a search warrant be obtained absent exigent circumstances. (2) No such exigent circumstances were proved in this case. (3) Good faith reliance upon the validity of the implied consent provided for in V.C. § 23612(a)(5) makes admissible defendant's blood/alcohol test results in this case.

Facts: After an evening of partying during which alcoholic beverages had been consumed, defendant drove some six other of his drinking buddies from the party. The time was just before 11:00 p.m. on April 29, 2013. After stopping at a liquor store to replenish their alcohol supplies, defendant reportedly began to "drive crazy." This resulted in him flipping the vehicle, injuring himself and at least two others (three having fled the scene on foot). One passenger suffered a serious brain injury. The unconscious defendant was transported to the Santa Clara Valley Medical Center with what appeared at the time to be life-threatening injuries.

Officer Valverde, assigned to keep track of defendant, arrived at the hospital at 11:39 p.m. and stood by while emergency personnel worked on him. Defendant was not brought out of the trauma unit until 12:23 a.m. Although still unconscious, defendant was formally arrested for felony DUI at 12:30 a.m. (although entries on a DMV form and radio broadcasts indicated that the officer arrested defendant an hour earlier, at about 11:30 or 11:35). A phlebotomist arrived at 1:05 a.m., over two hours after the accident, and took a blood sample from the still-unconscious defendant which was given to Officer Valverde for impounding. No warrant had been sought authorizing the blood draw. Officer Valverde later testified that it was impossible to conduct a blood test during the 90 minutes following the accident "because of the medical situation that was going on." Also, no warrant was sought out of a concern that any further delay after the arrest created a risk that defendant's blood-alcohol level might subside below the legal limit.

There was also some issue as to when Officer Valverde had first learned that defendant had been the driver; a fact relevant to when it was determined that a blood test was necessary. Defendant's blood/alcohol level was later determined to be .08% at the time blood was drawn. Charged in state court with one felony count of driving under the influence ("DUI") of alcohol or drugs, causing injury; one felony count of driving with a blood-alcohol content of 0.08 percent, causing injury; and a misdemeanor count of driving without a license, plus appropriate bodily injury enhancements, defendant filed a motion to suppress the blood/alcohol results.

The prosecutor argued that the warrantless blood draw was justified by any of four legal theories; (*1*) exigent circumstances, (*2*) statutorily imposed implied consent, (*3*) the officer's good faith belief that the extraction was lawful in light of long-standing practice under prior case law; and (*4*) good faith reliance on the implied consent statute. The trial court denied defendant's motion under the *second* (statutorily implied consent) and *fourth* (good faith reliance

upon California's implied consent statute) theories, rejecting the People's other arguments (exigent circumstance and good faith reliance upon prior case law). Defendant pled "no contest" and appealed.

Held: The Sixth District Court of Appeal affirmed. In affirming, however, the Court held that California's implied consent statute (V.C. § 23612), subdivision (a)(5) of which provides that implied consent includes the right to draw blood from an unconscious or dead DUI suspect, does *not* take precedence over the Fourth Amendment prohibition on warrantless blood draws. The Court also held that there were no exigencies proven in this case that would have provided an exception to the warrant requirement.

(1) *Warrantless blood draws*: Taking blood from a DUI suspect is in fact a search and seizure for purposes of the Fourth Amendment. Under the U.S. Supreme Court's decision in *Missouri v. McNeely* (Apr. 17, 2013) 133 S.Ct. 1552 (decided 12 days *before* defendant's arrest), the mere dissipation of a DUI suspect's blood/alcohol level, by itself, does not provide an exigent circumstance sufficient to avoid the need for a search warrant. V.C. § 23612(a)(1)(A) provides that "(a) person who drives a motor vehicle is deemed to have given his or her consent to chemical testing of his or her blood or breath for the purpose of determining the alcoholic content of his or her blood, if lawfully arrested for" a DUI-related offense. But such consent, by itself, imposed upon all drivers (licensed or not), has been held *not* to be "*actual consent*." Section 23612's implied consent does not overcome, therefore, the lack of a DUI suspect's actual consent to a blood draw. (*People v. Harris* (2015) 234 Cal.App.4th 671.) The Court here extended the rule of *Harris* to the situation where the DUI suspect is incapable of consenting due to unconsciousness, ruling that subdivision (a)(5) of section 23612, which provides for such an implied consent, also does not overrule defendant's constitutional Fourth Amendment protection from unreasonable searches and seizures. In other words, absent an exigency, a search warrant is required despite the statutory implied consent provided for under subdivision (a)(5) of section 23612.

(2) *Exigent circumstances*: In this case, the People argued that Officer Valverde lawfully had blood drawn from defendant's unconscious body despite the lack of a search warrant under the theory that had he waited until a warrant could have been obtained, too much of his blood/alcohol level would have dissipated, thus calling into question the accuracy of the blood test; i.e., an "*exigent circumstance*." The Court noted, however, that there was a discrepancy in the evidence as to whether the officer had arrested defendant 30 minutes, or 90 minutes, after the traffic collision, depending upon whether the officer's testimony or the radio transmission and documentary evidence was believed. The trial court found no exigency, inferring a finding that defendant's body was available for a blood draw no later than 30 minutes after the collision. With that finding being supported by the admittedly conflicting evidence, and with no evidence that this was insufficient time to obtain a warrant, the Court here was bound to sustain the trial court's decision this issue.

(3) *Good faith reliance upon the implied consent statute*: The Court also noted, however, that up until now, no prior appellate court decision has addressed the legal effects of the purported implied consent to make a warrantless withdrawal of blood from an unconscious DUI suspect, as provided for under V.C. § 23162(a)(5). The Court held, therefore, that the officer was entitled to rely upon the facial wording of that statute. Under a "good faith" theory, the Fourth Amendment does not require that the results of that blood test be suppressed. Defendant's conviction, therefore, was upheld.

Note: It cannot be argued that the officer also had a good faith reliance on the pre-*McNeely* legal rule to the effect that blood may be withdrawn without a warrant from anyone arrested for DUI, based merely upon the expected dissipation of the arrestee's blood/alcohol level. That's because *McNeely* was decided 12 days *before* defendant's arrest. So that issue was not even discussed. The Court also reminds us of the existence of V.C. § 13384, which provides that since 1999, anyone in California applying for, or renewing a driver's license must consent "in writing to submit to a chemical test or tests of that person's blood, breath, or urine . . . , or a preliminary alcohol screening test . . . , when requested to do so by a peace officer."

While there appeared to be some evidence here that defendant, since 1999, had in fact applied for and received a driver's license (although it was apparently not still valid at the time of this incident), the Court declined to decide whether such "*advance blanket consent*" was constitutionally sufficient to find an "*actual consent*" in a case like this because the issue was not thoroughly litigated at the trial court level. (See fn. 7 of the decision.) That issue, therefore, will have to await another day. But as for the officer's good faith reliance of the validity of the implied consent described in V.C. § 23612(a)(5), note that we were only able to get away with this theory because no prior case had decided the issue. *Now, it's been decided*: V.C. § 23612(a)(5) *does not* allow for a warrantless blood test of an unconscious DUI suspect absent exigent circumstances. Having now been decided, you can no longer argue that you didn't know the rule.

***Loitering Near School Grounds, per P.C. § 654b*:**

In re Gary H. **(Feb. 23, 2016) 244 Cal. App.4th 1463**

Rule: (1) Loitering around school grounds is illegal if done with the specific intent to commit a crime. (2) Evidence of an angry exchange between defendant, with a disciplinary history, and someone on the school grounds, under circumstances sufficient to indicate a fight was intended, supports the "intent to commit a crime" element.

Facts: Defendant, a 17-year-old minor, had been expelled from Jane Addams High School in Granada Hills for "various (undescribed) infractions." (Defendant testified that it was for failing to do assigned "detention hours.") On September 30, 2014, defendant and a companion were observed by the school's principal, James Kilroy, standing on the sidewalk outside the school's chain link gate as school was letting out. Defendant was observed having some sort of "yelling . . . "angry" argument with someone inside the gate. Principal Kilroy told the youths "to knock it off, and "to move on their way." Defendant and his companion, however, merely moved the argument around the corner to another chain link gate and, while still on the sidewalk, continued

"saying stuff" and making "angry, animated sort of gestures to someone inside [the] high school." So Principal Kilroy told them again to "get out of here," only to be told by defendant to "(g)o back to your office. I don't have to do what you say." When told by Principal Kilroy that he was going to call police, defendant told him to go ahead and do it. So he did.

Responding officers arrived and arrested a still belligerent, "verbally aggressive" ("I know my rights") defendant. A petition was filed in Juvenile Court under W&I Code § 602, charging defendant with violating P.C. § 653b; loitering about a school. (It was also alleged, under H&S Code § 11350, that defendant had been in possession of a Xanax pill, found on his person upon arrest. That charge was dismissed.) Defendant testified that he was there attempting to intervene in an argument and threatened fight between two friends at the school. The Magistrate didn't believe him, sustained the petition, and ruled that there was proof beyond a reasonable doubt that defendant loitered near the school grounds with the specific intent to commit a crime; i.e., to engage in a fight. Defendant appealed.

Held: The Second District Court of Appeal (Div. 5) affirmed. Two issues were litigated on appeal; (1) whether P.C. § 653b is, on its face, unconstitutionally vague and thus unenforceable, and (2) whether there was sufficient evidence to support the true finding on the P.C. § 653b (loitering) charge.

(1) *Vagueness*: Loitering near a school ground, and refusing to leave when asked by the school's principal, is illegal pursuant to P.C. § 653b. Subdivisions (a) and (d) of the section read as follows: (a) "[E]very person who loiters about any school or public place at or near which children attend or normally congregate and who remains at any school or public place at or near which children attend or normally congregate, or who reenters or comes upon a school or place within 72 hours, after being asked to leave by the chief administrative official of that school . . . is a vagrant, and is punishable . . ." as a misdemeanor. (d) "As used in this section, 'loiter' means to delay, to linger, or to idle about a school or public place without lawful business for being present." (Subdivisions (b) and (c) provide enhanced punishments for registered sex offenders and registered gang members, respectively.)

A statute that is impermissibly vague is void and unenforceable as a Fourteenth Amendment "due process" violation. Looking back to cases interpreting prior versions of this same offense, dating all the way to 1961, it was noted that the California Supreme Court has read into the statute, by judicial fiat, a definition of "loiter" that includes the requirement that it be done "for the purpose of committing a crime as opportunity may be discovered." Adding this "scienter" (i.e. intent) element makes the offense enforceable. In 1970, a definition of "loiter," very similar to today's definition, was added to the statute by the Legislature, removing any ambiguity and making it clear that the loitering must be done for some unlawful purpose (i.e., "to delay, to linger, or to idle about any such school or public place without a lawful purpose for being present.") Cases subsequent to this amendment established that the offense is not committed absent proof of an intent to commit a crime while lingering or remaining in the area of a school. The offense was subsequently moved to section 653b in its present form in 2006. Although subdivision (d), defining the term "loiter, says only that the loitering must be done "without lawful business for being present," a court

is allowed to use the prior case law defining this to mean that it be done for an unlawful purpose; i.e., to commit a crime. "(W)e presume the Legislature was aware and approved of the prior long-standing judicial construction of the statute, and we therefore construe the word "loiter" in section 653b to proscribe 'only that species of "lingering" and "idling" about schools or public places which is engaged in for an evil or sinister purpose,' namely 'for the purpose of committing a crime as opportunity may be discovered.'" As so construed, the statute is not void for vagueness. With defendant also meeting the final element of this offense; i.e., "remain(ing) at (the) school . . . after being asked to leave by the chief administrative official of that school" (or returning within 72 hours), defendant's true finding for violating this offense was upheld.

(2) *Sufficiency of the Evidence*: Defendant also argued, however, that there was insufficient evidence presented at his juvenile court hearing to support the true finding of an intent to commit a crime. Defendant, in his testimony, claimed that his intent for being there was to intervene in an argument between two other people. However, on appeal, the appellate court need only find that the magistrate's finding on this issue was supported by "substantial evidence." Discounting defendant's later claims, the Court found the necessary substantial evidence in Principal Kilroy's testimony that defendant had been previously dismissed from the school for various (albeit unspecified) "disciplinary infractions." When observed at the school's fence, defendant was engaging in an "angry, animated exchange" with someone on the school grounds. When asked to leave, defendant merely moved to another gate while continuing to "say stuff" to someone on the school grounds while making "angry, animated gestures." Principal Kilroy reasonably interpreted this as indications that a fight was about to break out. When asked to leave, defendant refused, telling Kilroy to go back to his office. Defendant's defiant attitude continued with the responding police officers. This was all sufficient to show that defendant was at the school with the intent to commit an assault; i.e., "for the purpose of committing a crime as opportunity may be discovered." The juvenile court's ruling on this issue, therefore, was supported by the evidence.

Note: Why the Legislature, with all the changes made to 653b (on another topic; note the lack of parenthesis around the "b"; *it makes a difference*) and its predecessors over the years, hasn't just included the words used by the California Supreme Court, statutorily adding an element in the section of "an intent to commit a crime" (instead of its current; "without lawful business for being present."), is beyond me. If they had done that, appellate court decisions such as this one wouldn't be necessary. More importantly, however, this case highlights the problem with enforcing some loitering statutes and ordinances. Loitering has been held to be legally permissible absent an intent to commit some unlawful act aside from the loitering itself. Statutes attempting to criminalize one's mere purposeless presence at a particular location, without imposing on law enforcement the requirement that the person be shown to be there for some bad or illegal purpose, have historically been struck down as unconstitutionally vague or overbroad. (E.g., see *Kolender v. Lawson* (1983) 461 U.S. 352, striking down as unconstitutionally vague former P.C. § 647(e); wandering about from place to place with no apparent purpose.) It matters not that the person is annoying, disgusting to look at, or otherwise offensive to one's sensibilities. In other words, people have a constitutional right to stand around and do nothing despite the lack of a purpose for bring there, and even if they smell, appear unkempt, or are otherwise disturbing to look at. Just don't tell your children that.